92-762

Supreme Court, U.S.
FILED
AUG 3 1992
OFFICE OF THE CLERK

No. _____

UNITED STATES SUPREME COURT

October 1992 TERM

DIANA M. MAULDING Petitioner

v.

LOUIS W. SULLIVAN, Secretary of Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX PETITION FOR WRIT OF CERTIORARI
VOL. 2 OF 2

Diana M. Maulding
Petitioner
1406 Ivy Chapel Road
Little Rock, AR 72206

501-888-7180

TABLE OF CONTENTS FOR APPENDIX
VOL. 2 OF 2

Initial decision of the Merit Systems Protection Board 92

Opinion on rehearing--Court of Appeals 130

Code provisions

5 U.S.C. Sec. 7703(c) 131

5 U.S.C. Sec. 7702(d)(1) 132

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.3 133

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.113-.114 135

29 C.F.R. Sec. 1613.701 137

29 C.F.R. Sec. 1613.702 138

29 C.F.R. Sec. 1613.703 -.704 141

28 U.S.C. Sec. 1291 144

5 U.S.C. Sec. 552a 144

5 U.S.C. Sec. 552a(e)(3) 146

5 U.S.C. Sec. 552a(e)(9) 147

5 U.S.C. Sec. 552a(e)(10) 148

5 U.S.C. Sec. (g)(1) 149

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

DIANA M. MAULDING APPELLANT

v. No. DA07528810647

DEPARTMENT OF HEALTH
AND HUMAN SERVICES AGENCY

Gary Green, Esq. North Little Rock, Arkansas, for the appellant

Mary M. Armstrong, Esq. Washington, D.C. for the agency

Before: Rebecca D. Westfall, Administrative Judge

Initial Decision

Diana L. Maulding filed a timely appeal from the agency's action removing her from her position as a pharmacologist, GS-11, Division of Comparative Toxicology, at the Food and Drug Administration's (FDA) National Center for Toxicological Research (NCTR), effective August 27, 1988. The Board has jurisdiction over this appeal. 5 U.S.C. Secs. 7511-7513.

Based on the following analysis and findings, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

The appellant was removed for absence without leave (AWOL) from May 16, 1988, through the date of her removal and for failure to follow the written instructions of her immediate supervisor, Dr. Lionel A. Poirier, to return to work or to contact him by June 28, 1988. A decision of an agency to remove an employee shall be sustained by the Board only if the agency's decision is supported by a preponderance of the evidence. 5 U.S.C. Sec. 7701(c)(1)(B). 1

The appellant may properly refuse to perform her assigned tasks if she

reasonably believes that she is in danger of imminent serious bodily injury.

It is undisputed that the appellant never reported for work from May 16, 1988, until the effective date of her removal. The appellant refused to return to work at the NCTR because as of May 11, 1988, Poirier had ordered her to report to work in a laboratory setting to begin receiving training in cell culture research. The appellant testified that she refused to go into the lab because she is extremely sensitive to organic solvents, such as acetone and acetate, which are present in the NCTR's lab to which the appellant was reassigned. See appeal file, tab 6, subtab 5. According to the appellant, her exposure to even small amounts of these substances has left her with severe respiratory problems. These include

experiencing a smothering sensation, wheezing, yawning, and labored breathing which can last for weeks after an exposure to an organic chemical solvent or compound.

The appellant testified that her difficulties began in 1974, while working at Rubicon chemicals in Geismer, Louisiana, when she inhaled phosgene gas. Thereafter for many weeks, she had difficulty breathing. The appellant was employed with NCTR in 1976 and worked in a lab in another division. Approximately a year later, the appellant suffered similar respiratory problems when she inadvertently inhaled octanol. At that time she first realized that she had an unusual sensitivity to volatile organic chemicals or solvents because her symptoms were identical to those which she

experienced in 1974. Her physician, Dr. Alvin W. Strauss, Jr., urged her to avoid all orgainc solvents and compounds. Strauss was concerned that further exposure could cause her to stop breathing altogether. The appellant added that, even with the protective equipment and ventilation available in the lab, where she worked before 1980, she experienced more respiratory problems due to exposure to organic solvents such as acetate. Many of these incidents involved the actions of other workers when using the chemicals, over which the appellant had no control.

It is well established as a general principle of labor law applicable to the private sector that an employee may refuse to obey insstructions from a supervisor to perform an assigned task, if she reasonably believes that to do so would

place her in a clearly dangerous situation. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980). While this Supreme Court decision was not directly applicable to the federal sector, the Board has assumed that federal employees are protected by the same concept. Haymore v. Department of the Navy, 9 M.S.P.R. 499, 504 (1982); Parker v. Department of the Interior, 4 M.S.P.R. 97, 100 (1980).

Based on the appellant's uncontradicted testimony, I find that she experiences severe respiratory problems when exposed to certain organic chemicals found in the lab environment to which she was reassigned on May 11, 1988. Thus, the next question to be resolved is whether the agency unreasonably rejected the appellant's medical documentation as being

insufficient to show that her condition warranted her restriction from the lab.

Because the agency's insistence that the appellant supply clinical medical evidence that she was medically restricted from performing her assigned duties was unreasonable, the charges may not be sustained.

Since 1980, when the appellant transferred into the Comparative Toxicology Division, the appellant has performed written review work which was done in an office setting. Poirier testified that even before he became the Division's Director in 1987, the employees, including the appellant (2), had been made aware that the Division would be undergoing a change in emphasis, from written review work to "bench type" laboratory research.

In Janurary 1988, the appellant requested agency approval of an outside activity and approximately twenty hours of leave without pay per week so that she could take a job as a law clerk. The appellant made this request in anticipation that she would be assigned lab work which she could not perform because of her sensitivity to organic chemicals and solvents. See appeal file, tab 6, subtab 2.

Poirier denied this request and asked the appellant to submit medical information which would be reviewed by the FDA's physician so that the agency could determine whether the apellant's medical condition warranted restriction from lab work. See appeal file, tab 6, subtab 3. Poirier requested, inter alia, the results of clinical tests or other diagnostic

procedures showing exactly what substances she needed to avoid, the results of clinical tests explaining the minimal levels likely to cause injury to the appellant, whether her condition was controllable with medication or other treatment, and whether her condition was static or was likely to become worse.

The medical statements which the appellant presented to the agency were historical in nature and related the appellant's subjective history of the severe respiratory problems which developed after her initial exposure to phosgene and her other exposures. Two of the appellant's doctors recommended that she be restricted from lab work. See appeal file, tab 6, subtabs 1 and 13. The appellant also provided a detailed history of her sensitivity to the chemical found in the

NCTR's lab to the FDA's consulting doctor, Dr. George M. Smith. See appeal file, tab 20, the agency's hearing exhibit 4.

Smith testified that he is a contract employee with the FDA. As the agency's consulting physician, Smith reviews medical records submitted by FDA employees, when the agency is contemplating some personnel action based on an employee's medical condition. 3 In accordance with 5 C.F.R. Secs. 339.101-.304, Smith found that the medical information submitted by the appellant was insufficient to demonstrate that she needed to be restricted from lab work, because it was completely historical in nature and based on the appellant's subjective sysptoms. Smith testified that he did not doubt that the appellant and her doctors believed that she had a

medical condition. However, he stated that without the results of clinical testing, which demonstrated the scientific existence of the medical condition, he could not find that the appellant should be restricted from working in the lab.

After Smith initially found that the medical evidence which she had submitted was inadequate, the appellant made extensive efforts to get the objective clinical evidence necessry. However, because her first negative exposure happened in 1974, she was unable to obtain the records of her medical treatment. Thereafter, she contacted several physicians trying to find someone who could, in conformity with acceptable medical procedure, administer an objective medical test which would document her sensitivities to the organic compounds.

None of the physicians she contacted knew of any medically acceptable clinical procedure, such as a pulmonary challenge test, which could be done with potentially toxic chemicals, and thereby provide the documentation Smith required. See the appeal file, tab 20, the appellant's hearing exhibits, X, Y, Z.

On cross-examination Smith was asked if he knew of any doctor who could perform the required clinical tests to test for a sensitivity such as the appellant's. Smith replied that he kne of one physician in the entire country who could perform these tests. According to Smith, Dr. John Selner, an allergist practicing in Denver, Colorado, has been able to perform tests for chemical sensitivities through the use of specially designed chambers. Smith knew of no physician in Arkansas who could

perform similar tests. It is undisputed that before the hearing, Smith had not informed either the appellant or any of her representatives about Selner.

Under the cricumstances of this case, however, I find that it would be a violation of fundamental fairness to expect the appellant to produce clinical medical evidence to support request that she not be reassigned to lab work. Accordingly, I find the agency unreasonably rejected the appellant's medical evidence which clearly demonstated that she has an unusual sensitivity to organic chemicals and solvents found in the lab to which she had been assigned. The agency's charges are therefore not sustained.

The appellant did not prove that the agency engaged in reprisal.

Even though I have not sustained the agency's charges against the appellant, the Board requires that the administrative judge address all of the material issues raised in the appellant's appeal, including claims of reprisal and discrimination. Jones v. Department of the Navy, 36 M.S.P.R. 593, 597 (1988); Grate v. Department of the Army, 33 M.S.P.R. 156, 158 (1987). On appeal, the appellant raises three affirmative defenses. These are that (1) the agency's action in assigning her to the lab was in reprisal for the appellant's engaging in the protected activities of objecting to a new peer review system at NCTR and seeking the intervention of the Office of Personnel Management to stop its

implementation during the summer of 1987, (2) the agency discriminated against the appellant on the basis of her sex, and (3) the agency discriminated against her on the basis of her handicapping condition of extreme sensitivity to organic solvents.

Irrespective of the merits of an agency's case, a decision to remove an employee will not be sustained by the Board if the appellant demonstrates that the decison to remove her was based on a prohibited personnel practice, such as discrimination or reprisal. 5 U.S.C. Sec. 7701(c)(2)(B). The appellant bears the burden of proving all of her affirmative defenses by preponderant evidence. 5 C.F.R. Sec. 1201.56(a)(2)(iii) (1988); Savage v. Department of the Navy, 36 M.S.P.R. 148, 151 (1988).

In order to show reprisal, the appellant must demonstrate that she engaged in a protected activity, that the deciding official knew of her activity, that this adverse action could under the circumstances have been retaliation, and that there was genuine nexus between the retaliation and the action taken. Warren v. Department of the Army, 804 F.2d 654 (1986); Gomez v. Department of Justice, 36 M.S.P.R. 56, 60 (1988). The protected activity must be shown by a preponderance of the evidence to have been the motivating factor or real reason for the agency's action. See Gerlack v. Federal Trade Commission, 9 M.S.P.R. 268 (1981). If it is shown that unlawful retaliation played a substantial role in the agency's decision to take the adverse action, the agency must then show by preponderant evidence that it would have taken the same

action even if the protected activity had not occurred. Id.

It is undispouted that the appellant was assigned to report to the lab approximatly eleven months after she first spoke out in a meeting at the NCTR against the proposed peer review system and ten months after she unsuccessfully sought intervention by OPM in this matter. On review of the activities engaged in by the appellant, I find that they are not covered by the provisions of either 5 U.S.C. Sec. 2302(b)(8) or (b)(9). Moreover, even if the appellant had proven that she had engaged in protected activities in opposing the peer review system, she still would not prevail on this affirmative defense because I find no evidence that the appellant's conduct in opposing the peer review system was the motivating

factor for her reassignment o lab work. As I have previously found, the agency had contemplated a return to bench type lab work for all of the employees in the appellant's division as early as 1985. Therefore, I find that the appellant has failed to show by preponderant evidence that the agency's motivation in reassigning her to the lab was predominately retaliatory or that the agency's asserted reasons for reassigning her to lab work were pretextual. Accordingly, I find that the appellant's first affirmative defense must fail.

The appellant did not prove that the agency discriminated against her because of her sex.

In reviewing an allegation of discrimination, the Board has adopted the

test for the allocation of the burden of proof established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g., Davis v. Department of Commerce, 28 M.S.P.R. 535, 537-38 (1985). Under McDonnell Douglas, the appellant has the burden of establishing a prima facie case of discrimination. She may meet this burden by showing that (1) she is a member of a protected class; (2) she is similarly situated to an individual who is not a member of her protected group; and (3) she was treated more harshly or disparately than the individual who is not a member of his protected group. The appellant must also show that the different treatment is based upon an intent to discriminate, which may be shown by circumstantial evidence. See Fenn v. Department of the Army, 35 M.S.P.R. 362, 366 (1987).

If the appellant establishes a prima facie case of discrimination, the burden of going forward with the evidence shifts to the agency to articulate a legitimate, non-discriminatory reason for its different treatment of the appellant. McDonnell Douglas, at 802; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the agency meets its burden, the appellant must show that the stated reason is merely a pretext for discrimination. Id.; Fenn at 367.

To support her claim of discrimination on the basis of sex, the appellant alleges that on one occasion when she requested sick leave, it was denied and she was charged with AWOL, while male staff members in her division were granted sick

leave. She also alleges that on one occasion she was denied credit leave because she had failed to obtain her supervisor's prior approval, while a male co-worker, who has also failed to receive prior supervisor approval, was granted the credit leave.

The record reflects that the appellant was a member of a protected group. However, with regard to her first allegation concerning the denial of sick leave, I find she has not presented any evidence to support her claim that similarly situated male employees were granted sick leave.

With regard to her claim that she was treated disparately regarding credit leave, I find that the documentary evidence introduced by the appellant fails to support her allegation. For example,

although the appellant has introduced documentary evidence to show that she was marked AWOL during the pay period ending April 23, 1988, I find that it is not possible to tell whether this AWOL is attributable to a denial of sick leave or credit leave. See appeal file, tab 20, the appellant's hearing exhibits GG and HH. Moreover, none of the leave slips denying her credit hours support the appellant's assertion that her request for credit hours was denied because she had failed to obtain previous supervisory approval. See appeal file, tab 20, the appellant's hearing exhibits OO, KK, and PP. 4 Finally, I note that even if the documentary evidence showed that the appellant was denied credit leave because of her failure to obtain prior approval, the agency had a legitimate reason for the disparate treatment afforded that male

co-worker. Unlke the appellant who was working five days a week, and, therefore should have been familiar with the change in policy, the male co-worker regularly worked only four days and may have not have been aware of the new policy. See appeal file, tab 20, the appellant's hearing exhibit II. Thus, I find that the appellant has failed to support her second affirmative defense by preponderant evidence and it too must fail.

The appellant is a handicapped individual.

As her third affirmative defense, the appellant alleged that the agency discriminated against her because of her handicapping condition. The appellant argued that the agency should have accommodated her handicapping condition by seeking to reassign her to a job within

her physical limitations for which she was qualified. To establish a prima facie case of discrimination on the basis of a handicapping condition, the appellant must show that: (1) she is a qualified handicapped person 5 pursuant to 29 C.F.R. Sec. 1613.702(a) and (f) (1987), (2) the agency action appealed to the Board was based on her handicap, (3) the appellant has, to the extent possible, articulated a "reasonable accommodation" under which she believes that she could perform the essential duties of her position or of a vacant poistion to which she could be reassigned, and (4) the agency has failed to reasonably accommodate her handicapping condition. If an employee is a qualified handicapped person, then the agency is required to provide reasonable accommodation for the handicap, unless it can demonstrate that to do so would

require substantial modification of the position or that to do so would impose an undue hardship on the operations of its program. Savage at 152-53; Stalkfleet v. U.S. Postal Service, 6 M.S.P.R. 637, 648 (1981). Moreover, reassignment to another position must be considered as a reasonable accommodation for a qualifed handicapped person. Ignacio v. U.S. Postal Service, 30 M.S.P.R. 471, 486-87 (Spec. Pan. 1986).

On review of the record, I find that the appellant's sensitivity to organic solvents so limits her ability to work in a laboratory situation that she is a physically handicapped individual as defined by regulation 29 C.F.R. Sec. 1613.702(a) (1988). I further find that as early as April 12, 1988, the appellant articulated a reasonable accommodation for

her handicapping condition when she first formally requested to be reassigned to another position. See appeal file, tab 20, the appellant's hearing exhibit "BB." The record reflects that the appellant has a wide variety of job skills in addition to her experinece as chemist. These include accounting, research and writing, data reduction, and some clerical skills. Additionally, the appellant has recently earned a law degree.

Neither the applicable anti-discrimination regulations nor the Board's precedent require an agency to create a position for an otherwise qualified handicapped employee. The required accommodation is reassignment ot a vacant position for which the appellant could perform the job's essential functions, with or without

accommodation. McLean v. Department of the Army, 36 M.S.P.R. 405, 408 (1988).

On review of the testimony given by Poirier, Norris, and Dick L. King, an FDA Personnel Specialist assgned to the NCTR, it appears that no effort was made to accommodate the appellant's handicapping condition by way of reassignment. The appellant tetified about two vacant positions which she believed existed at NCTR and for which she might be qualfied. She identified these positions as being the Center's Archivist and Special Staff Assistant to the Director. The appellant's testimony about these two positions was very general and was obviously not based on her review of any current vacancy announcements or position descriptions. King denied that either position identified by the appellant currently

exists. From the testimony given by King and Norris, it appears that the work of maintaining the archives was assigned to a GS-4 clerical employee and that the NCTR's Director had not been able to formally establish the position of Special Staff Assistant.

While King was certain neither of the two positions named by the appellant existed, he could not recall specifically whether there had been any vacancies for which the appellant was qualified at the Center between May 1988 and the time of the hearing. King indicated that such vacancies could have existed.

On review of the evidence of record, I find that although the agency had an obligation to conduct a search for a position into which the appellant could be

lawfully reassigned, it failed to do so. I further find that the agency offered no proof as to why conducting such a search or reassigning the appellant to a suitable vacancy, if one had existed or currently exists, would cause undue harship on its operation. I find, therefore, that the apppellant has satisfied her burden of establishing a prima facie case of handicap discrimination which the agnecy has failed to rebut.

Decision

The agency's action is REVERSED

ORDER

The agency is ORDERED to cancel the appellant's removal and to retroactively accommodate her handicapping condition by

conducting a search of all vacancies which have existed at NCTR since April 12, 1988, and, if possible, by placing the appellant into a vacant position for which she quialifies which is consistent with her medical restrictions. This action must be accomplished no later than sixty calendar days afer the date this initial decision becomes final.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay and benefits in accordance with the office of Personnel Management's regulations, no later than sixty calendar days after the date this initial decision becomes final. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary informaiton

requested by the agency in furtherance of compliance.

If there is dispute about the amount of back pay due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than sixty calendar days after the date this initial decision becomes final. The appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its intentions.

For the Board: Rebecca D. Westfall, Administrative Judge

NOTICE TO APPELLANT

This initial decision will be come final on February 22, 1989, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition,

you must file it within the proper time period.

Board Review

You may request Board review of this initial decision by filing a petition for review. Your petition for review must satate your objections to the initial decision, supported by references to applicable law, regulations, and the record. You must file your petitiion with: [address omitted]. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than thirty calendar days after the date this initial decision becomes final. The address of the EEOC is: [address omitted].

JUDICIAL REVIEW

If you do not want to file apetition with the EEOC, you may ask for judicial review of both discrimination and non-discrimination issues by filing a petition with the appropriate United States District Court no later than thirty calendar days after the date this initial decision becomes final.

If you choose not to contest the Board's decision on discrimination, you may ask for judical review of the nondiscrimination issues by filing a petition with: [address omitted]. You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than thirty calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petitiion for review is filed, you may ask for the payment of attorney fees by filing a motion with this office no later than twenty calendar days after the date this initial decision becomes final.

ENFORCEMENT

If, after the agency has informed you that it has complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than thirty calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

[certificate of service omitted]

footnotes

1. A preponderance of the evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. Sec. 1202.56(c)(2) (1988).

2. The record reflects that as early as April 5, 1985, Strauss had written a letter in the appellant's behalf recommending that she not be reassigned to the lab. See appeal file, tab 6, subtab 1.

3. Smith has a background in public sector health and between 1977 and March 1983, he was OPM's National Medical Director. During this time he helped to develop the regulations found at 5 C.F.R. Secs. 339.101-.304 which govern the type

of medical evidence required before a personnel action can be taken based on a medical condition.

4. The appellant's request for credit hours was denied because her supervisor found that she had priority work which was not being accomplished.

5 A handicapped person is one who has a physical or mental impairment which substantially limits one or more of her major life activities, such as performing manual tasks, walking and working. 29 C.F.R. Secs. 1613.702(a) and (c) (1988). A qualfied handicapped person is one who, with or without accommodation, can perform all of the essential functions of a position without endangering herself or others. 29 C.F.R. Sec. 1613.702(f) (1988).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DIANA M. MAULDING APPELLANT

v. No. 91-2747EALR

LOUIS W. SULLIVAN, head
of Department of Health &
Human Services; Department
of Health & Human Services APPELLEES

Appeal from the United States District
Court fo the Eastern District of Missouri
[sic]

Appellant's Pro Se petition for rehearing
has been considered by the court and is
denied.

May 5, 1992

Order entered at the direction of the
court: Michael E. Gans, clerk

CODE PROVISIONS

5 U.S.C. Sec. 7703(c)

In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 U.S.C. Sec. 7702(d)(1)

If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including-

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.3

Appellate jurisdiction; Definition and application.

(a) Appellate jurisdiction generally. The Board has jurisdiction over appeals from agency actions when the appeal is autorized by law, rule, or regulation. This appellate jurisdiction includes: . . .(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR Part 752, Subparts C and D; 5 U.S.C. 7512); . . . .

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.111

Initial decision by presiding official.

(a) The presiding official shall prepare an initial decision after the closing of the record. Such initial decision shall be immediately transmitted to the Clerk of

the Board, to the Director of OPM, and to all parties to the appeal, including named parties and intervenors, whether permissive or of right.

(b) Each initial decision sahll contain:

(1) Findings of fact and conclusions of law, as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record;

(2) An order as to the final disposition of the case, including appropriate relief;

(3) The date upon which the decision will become final, which, for purposes of this section, shall be 35 days after issuance; and

(4) A statement of any further process available, including, as appropriate; petition for enforcement under Sec. 1201.182, petition for review under Sec. 1201.114 and judicial review.

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.113

Finality of decision

The initial decision of the presiding official shall become final 35 days after issuance. Such decisions are not precedential. . . .

(b) Petition for review denied. If the Board denies allpetitions for review, the initial decision shall become final upon the issuance of the last denial.

(c) Petition for review ganted or case reopened. If the Board grants a petition for review or a cross petition for review, reopens or dismises a case, the decision of the Board shall be the final decision unless otherwise specified therein. . . .

5 C.F.R. Ch. II (1-1-88 Ed.) Sec. 1201.114(a)

Who may file. Any party to the preoceeding, the Director of OPM, or the

Special Counsel may file a petition for review. . . .

Purpose and applicability.

(a) Purpose. This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on acccount of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) Applicability. (1) This subpart applies to executive agencies as defined in section 105 of Title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service. (2) This subpart applies to the U.S. Postal Service and Postal Rate Commission. (3) This subpart applies only to applicants and employees

who have a handicap as defined in Sec. 1613.702(a).

Sec. 1613.702 Definitions

(a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) or has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) "Physical or mental impairment" means (1) any physilogical disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental pr

psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) "Has a record of such an impairment" means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

(e) "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not

substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.

(f) "Qualfied handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements

(which may include passing a written test of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

Sec. 1613.703 General policy

Agencies shall give full consideration to the hiring, placement , and advancement of qualified mentally physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualfied physically or mentally handicapped person.

Sec. 1613.704 Reasonable accommodation

(a) An agency shall make reasonable accommodation to the known physical or

mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examination, the provision of readers and interpreters, and other similar action.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in

question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

Sec. 1613.705 Employment criteria

[omitted]

Sec. 1613.706 Preemployment inquiries

[omitted]

[43 FR 12295, Mar. 24, 1976. Redesignated at 43 FR 60901, Dec. 29, 2978, and amended at 46 FR 11285, Feb. 6, 1981]

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final dcisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiciton of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5 U.S.C. Sec. 552a Records maintained on individuals

[Section 552a is voluminous; only relevant parts are printed.]

(a) Definitions. --For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol,

or other identifying particular assigned to the individual, such as a finger or voice print or a phtograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

[(6) and (7) omitted.]

5 U.S.C. Sec. 552a(e) Agency requirements.--Each agency that maintains a system of records shall--

[(1) through (2) and (4) through (8) and (11) omitted as not relevant to this issue]

(3) inform each indivdual whom it asks to supply information, on the form which it uses to collect the information or on a

separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information; . . . . [next section begins]

5 U.S.C. Sec. 552a(e)(9)

establish rules of conduct for persons

involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and [(11) omitted.]

5 U.S.C. Sec. 552a(g)(1) Civil remedies.--Whenever any agency [(A) through (C) omitted, not relevant] (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

[(2)(A) omitted]

(2)(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

[(3) omitted]

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines taht the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought

in the district court of the United States in the district in which the complainant resides, . . . without regard to the amount in controversy, within two years from the date on which the cause of action arises . . . .

Petitioner
Diana M. Maulding
1406 Ivy Chapel Rd.
Little Rock, Arkansas
72206
501-888-7180

Respondent
Lesa Jackson
600 W. Capital Ave.
Little Rock, Ark.
72201
501-324-5342

Diana M. Maulding